No. 95-124

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Supreme Court of the United States

OCTOBER TERM, 1995

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC. AND AMERICAN CIVIL LIBERTIES UNION,

Petitioners,

—v.—

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully submit this reply to the government's brief in opposition to address certain errors of law and fact.

ARGUMENT

I.

THE GOVERNMENT MISSTATES THE QUESTION PRESENTED IN AN ATTEMPT TO SUGGEST THAT THE CONSTITUTIONALITY OF CABLE OPERATORS' DECISIONS IS AT ISSUE, RATHER THAN THAT OF A FEDERAL STATUTE.

Petitioners challenge section 10, which singles out disfavored speech and delegates the power to censor that speech to cable operators, and the censorship requirements it imposes on those cable operators. Because section 10 is an act of Congress, it is subject to constitutional scrutiny.

In order to avoid such scrutiny, the government attempts to label the speech-limiting impact that section 10 will predictably have — and that it was *intended* to have[1] — as something other than the product of governmental action by mischaracterizing these proceedings as a challenge to cable operators' private censorship decisions. *E.g.*, Opp. at i (rewriting the petition's second question presented as "[w]hether a cable operator's decision to prohibit indecent programming . . . is 'state action'").

The questions posed in these proceedings have always focused, instead, on Congress' content-based delegation that encourages and indeed pressures cable operators to make those censorship decisions and on the government's participation in the censorship scheme. The question here is not whether a particular act of censorship violates the First Amendment or relevant statutes, as in a case recently decided in New York City,[2] but rather whether Congress can delegate to the enemies of cable access channels the power to censor disfavored speech that it could not grant directly to government officials.

The government evades admitting that section 10 is a content-based statute: one that authorizes censorship of speech that Congress has deemed to be offensive based squarely on its content and whose intended and inevitable impact is to diminish the quantity of such speech that willing speakers would

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[1] Indeed, Senator Helms plainly stated that the purpose of section 10's liability provision is to "put an end to the kind of things going on" on cable access channels, 138 CONG. REC. S652 (daily ed. Jan. 30, 1992), and Senator Fowler stated that indecent programming "should be stopped, must be stopped, and I think this amendment will empower the cable operators to stop it," *id.* at S649.

[2] *Goldstein v. Manhattan Cable Television, Inc.*, No. 90 Civ. 4750, 1995 WL 562182 (S.D.N.Y. Sept. 20, 1995) (finding plaintiffs had a likelihood of success on statutory and constitutional claims and entering preliminary injunction against cable operator's plan to scramble leased access programs allegedly pursuant to section 10).

otherwise offer to willing listeners. The government does acknowledge that section 10 is a federal statute "enacted and implemented as the result of governmental action," but attempts to minimize the consequences of that fact with the conclusory assertion that "the mere enactment of those provisions does not limit the speech of any individual or entity." Opp. at 12. This is plainly false.

Section 10 directly limits the provision of "indecent" speech on leased access channels and the receipt of such speech by persons who would otherwise receive it, because it authorizes censorship that would be unlawful but for its passage. In every instance that cable operators (who have for many years been hostile to the entire enterprise of access channels) do not ban such protected speech under section 10(a), Congress requires them to segregate and block that speech under section 10(b), depriving willing viewers of such speech absent the kind of "affirmative act" this Court held impermissible in *Lamont v. Postmaster General*, 381 U.S. 301, 306-07 (1965). The government is also directly involved in all censorship of "indecent" programming on PEG and leased access channels pursuant to sections 10(a) and (c), because it defines the censored category of speech and prescribes the censorship procedures. *See* Pet. at 17-19.

Section 10, thus, presents one of the very type of "regulations that suppress, *disadantage, or impose differential burdens upon* speech because of its content" that this Court recently held require strict First Amendment scrutiny. *Turner Broadcasting Sys. v. FCC*, 114 S. Ct. 2445, 2458-59 (1994) (emphasis added).

Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989), which the government does not and cannot distinguish, also makes plain that section 10 is subject to constitutional scrutiny. In *Skinner*, this Court specifically held that a statute that merely permits, but does not compel, private drug testing nevertheless gives rise to constitutional scrutiny because, as in

this case, "the Government did more than adopt a passive position towards the underlying conduct." *Id.* at 615. The conflict between the court of appeals' decision and *Skinner* warrants this Court's review.

II.

THE GOVERNMENT RELIES UPON INAPPOSITE CONGRESSIONAL FINDINGS TO SUPPORT ITS POSITION.

It is well-established that in First Amendment cases courts cannot simply defer to Congress; the government has the burden of meeting the compelling state interest/least restrictive means test. *E.g.*, *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 130 (1989) (statute struck down where no congressional findings existed on the ineffectiveness of extant regulation).

The government attempts to distract the Court from Congress' lack of any findings regarding indecency on cable by focusing on findings regarding a completely different medium, telephones. Opp. at 18 (section 10(b) is "based on similar blocking requirements used to control children's access to dial-a-porn," and "Congress *could* reasonably draw upon the knowledge gained in constructing that analogous legislation") (emphasis added).[3]

However, especially where, as here, Congress did not even consider the most obvious and constitutionally unproblematic alternative — scrambling "indecent" programming *at a particular subscriber's request* — the telephone-related findings that the government cites are entirely inapposite and cannot govern the fact-specific least restrictive means inquiry as to section 10. Indeed, the telephone medium has technological capabilities and practical configuration wholly different from the

[3] *See* Opp. at 17 (courts upholding dial-a-porn restrictions concluded that "voluntary blocking 'would not even come close' to eliminating the access of minors to indecent messages" over the telephone).

cable medium. *See* Regulations Concerning Indecent Communications by Telephone, 5 FCC Rcd 4926 (1990). For example, in the telephone medium, it is not technologically practical to use voluntary blocking because of the extremely large number of dial-a-porn numbers and the ease of creating or switching to new numbers. By contrast, cable lockboxes present a proven means of voluntary blocking because there are only a few access channels on any given cable system and cable operators rarely reallocate channel numbers. Moreover, outside of the home, children have ready access to unsupervised telephones, but the same is not true of cable. *See* Pet. App. at 68a-69a.

The government has not drawn the Court's attention to, nor do there exist, any of the specific findings as to cable and indecency that it references as to telephones and "dial-a-porn." There are not even any findings that cable is so analogous to telephones that it should be similarly regulated. Neither set of findings can be implied, as the government attempts to do, for this Court has always emphasized that the specifics of each medium of communication require individual treatment. *E.g.*, *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) ("each medium of expression presents special First Amendment problems").

III.

THE GOVERNMENT'S BRIEF IN OPPOSITION DEMONSTRATES THE IMPORTANCE OF RESOLVING THE ISSUES PRESENTED IN THE PETITION.

The government argues that section 10 is not subject to constitutional scrutiny because it only empowers cable operators to censor protected speech and only "restores" the law to a previous state that cannot be attributed to governmental action. Opp. at 11-16. This position, accepted by the majority of the court of appeals, creates for Congress a huge loophole through

which it may regulate without regard for constitutional principles.

If this loophole is not closed, then Congress — in the name of "restoring" previous rights — could, with complete immunity from constitutional scrutiny, enact legislation authorizing cable operators to censor all speech by Jews, or Latinos, or welfare recipients on access channels; authorizing telephone companies with common carrier obligations to censor political speech by fundamentalists; or authorizing private employers to discriminate against African-Americans who maintain dissenting political views (thereby "restoring" some of what Title VII took away).[4]

Pursuant to the government's argument and the court of appeals' holding, each of those laws would be exempt from constitutional challenge because courts would look only to the private entity inflicting the censorship, regardless of the permissibility of the legislated lines drawn or the predictable and intended effect of the legislation. For this reason alone, the Court should grant the petition and resolve whether Congress may act without impediment in such a novel fashion.[5]

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[4] Nor is the principle animating the court of appeals' holding limited to legislation permitting censorship. Congress could, by "restoring" a portion of authority previously denied, authorize — without constitutional scrutiny — banks to discriminate against Asian-Americans in providing mortgages, native-American tribes to reclaim land currently owned by the original governmentally approved title holder, and airlines to prohibit transportation of Muslim religious articles. Because the "ultimate" discrimination in each instance would be undertaken by a private party, there would be no state action, and the legislation delegating that power to discriminate would be unreviewable.

[5] The government's "restoration" argument is also factually baseless. Section 10 does not restore to cable operators a power they possessed as a consequence of "ownership rights" prior to enactment of the 1984 Cable Act, as if every channel were a page in THE

(continued...)

The government's invitation to this Court to wait and allow courts to consider further section 10 after it goes into effect, *see* Opp. at 11 n.5 — even if it were otherwise sound with respect to the constitutional merits — ignores the fact that this case is the *only* challenge to the rulemaking with which this Court will ever be presented. *See* 28 U.S.C. § 2344. Nor is there merit to waiting for further factual development in the lower courts on the state action issue, which presents a pure question of law. The decision and analysis below are squarely in conflict with *Skinner* and *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956), and allowing the decision below to stand, to be applied subsequently by lower courts and to be taken advantage of by Congress, would cause chaos in the cable industry and result in a plethora of unnecessary litigation to redress the attendant impact on constitutional and statutory rights.

If the petition were denied and section 10 were allowed to go into effect, the magnitude of the censorship and self-censorship that would occur before the courts could address section 10 in the manner suggested by the government would be immeasurable and constitutionally intolerable. The interim self-censorship would never be remedied, and courts around the nation are likely to be inundated with suits by cable programmers and viewers. Therefore, the Court should resolve these issues before section 10 — which clearly cannot withstand strict scrutiny, as even admitted in part by the government, *see* Pet. App. at 11a, 32a, 104a n.9 — is allowed to go into effect.

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[5](...continued)
MIAMI HERALD subject to their unfettered discretion. Opp. at 13. Even prior to 1984, most cable franchises (such as those in New York State) required, by law in some states, the set-aside of cable access channels and prohibited content censorship thereon. *See, e.g.*, N.Y. Exec. L. § 829. Thus, section 10 does not return what federal law took away; rather, it overrides local law and grants cable operators a content-based censorship power that they never had.

CONCLUSION

For all the foregoing reasons and for all the reasons stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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